December 2005

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.7 Child Sexually Abusive Activity

A. Statutory Authority

3. Possession of Child Sexually Abusive Material

Insert the following text before subsection (B) in the March 2003 update to pages 132–133:

Determining whether images stored in temporary Internet or deleted files on the defendant's computer could establish his knowing possession of child sexually abusive material was unnecessary where the complainant and the defendant's wife testified that the "defendant look[ed] at images of adolescents on his computer screen for extended periods of time, including during the course of engaging in sexual acts [and] defendant's friend testified that defendant had emailed him pictures of nude children." *People v Girard*, ___ Mich App ___, ___ (2005).

CHAPTER 3

Other Related Offenses

3.11 Dissemination of Sexually Explicit Matter to Minors

A. Statutory Authority—Disseminating and Exhibiting

2. Statutory Exceptions

Insert the following text immediately before subsection (B) in the January 2004 update to page 144:

Effective December 1, 2005, by 2005 PA 108, the statutory provisions concerning sexually explicit matter, MCL 722.671 *et seq.*, are specifically contained in Part I, to which the title "Sexually Explicit Matter" was added.*

*Also effective December 1, 2005, 2005 PA 108 added a new Part II, "Ultra-Violent Explicit Video Games," MCL 722.685 *et seq*.

2005 PA 108 also added a new section, MCL 722.682a, containing exceptions to the statutory provisions found in Part I, Sexually Explicit Matter. The new section, effective December 1, 2005, states:

> "Sec. 12a. This part does not apply to any of the following:
>
> > "(a) A medium of communication to the extent regulated by the federal communications commission.
> >
> > "(b) An internet service provider or computer network service provider that is not selling the sexually explicit matter being communicated but that provides the medium for communication of the matter. As used in this section, 'internet service provider' means a person who provides a service that enables users to access content, information, electronic mail, or other services offered over the internet or a computer network.
> >
> > "(c) A person providing a subscription multichannel video service under terms of service that require the subscriber to meet both of the following conditions:
> >
> > > "(*i*) The subscriber is not less than 18 years of age at the time of the subscription.
> > >
> > > "(*ii*) The subscriber proves that he or she is not less than 18 years of age through the use of a credit card, through the presentation of government-issued identification, or by other reasonable means of verifying the subscriber's age."

November 2005

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

O. "Mentally Incapable"

Insert the following text on page 85 before the last full paragraph in this subsection:

A victim may be "mentally incapable" of fully understanding the nonphysical factors involved in sexual conduct with a defendant even though the victim demonstrated his comprehension of the physical nature of the sexual relationship between himself and the defendant, as well as an "awareness of the events as they occurred." *People v Cox*, ___ Mich App ___, ___ (2005), citing *People v Breck*, 230 Mich App 450, 455 (1998). In *Cox*, the defendant was convicted of two counts of CSC-3 for engaging in prohibited conduct with a "mentally incapable" seventeen year old. The defendant argued that the victim could not be considered "mentally incapable" because "the victim attended school, was able to perform automotive repairs, could hold conversations and maintain relationships with people, and could choose his sexual partner." The Court disagreed. According to the Court, "ample evidence" was presented at trial to support a finding that the victim was "mentally incapable" of consenting to the sexual relationship with the defendant:

> "The victim's Family Independence Agency caseworker testified that the victim was not ready to live on his own and that he was easily manipulated and persuaded to do things that he probably would not do without another's influence.
>
> * * *
>
> "A psychologist who examined the victim testified that he had a significant history of abuse and neglect, and was mentally deficient, functioning in the 'borderline' range of intelligence,

> which is a step below 'below average' and a step above 'mental retardation.' . . . [The psychologist] characterized the victim as a 'pretty immature individual,' and opined that even though the victim 'certainly . . . knew what was proposed' and was aware of his conduct, he could not appreciate the social or moral significance of his acts relating to the homosexual encounter with defendant, and was incapable of making an informed decision about sexual involvement.
>
> "A counselor . . . described [the victim] as impressionable, very susceptible to manipulation by others, and characterized him as a follower. . . . [The counselor] stated that the victim's need for acceptance is so great that he gravitates to anyone who will pay attention to him, and cannot distinguish whether a person is being genuine in their [sic] actions." *Cox, supra* at ___.

The defendant also argued that there was insufficient evidence in support of finding that he "knew or had reason to know" that the victim was mentally incapable. The *Cox* Court, citing *People v Davis*, 102 Mich App 403, 406–407 (1980), explained that the language used in MCL 750.520d(1)(c)—"knows or has reason to know"—functions only to "eliminate liability where the mental defect is not apparent to reasonable persons." *Cox, supra* at ___, quoting *Davis*, *supra* at 407. According to the *Cox* Court, sufficient evidence was presented to refute the defendant's claim:

> "[S]everal witnesses testified that the fact that the victim was mentally deficient is readily noticeable after only a short period of interaction. The psychologist opined that a reasonable person could discern within an hour that the victim has a mental defect, because the victim has inarticulate language, difficulty understanding words, and does not make inquiries typical of a seventeen-year-old." *Cox, supra* at ___.

The *Cox* Court also noted that the defendant had "ample opportunity to notice [the victim's] limitations." Evidence showed that the victim had visited the defendant's home on five to ten occasions, and that the defendant went to see the victim at the victim's foster home.

CHAPTER 7
General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the July 2005 update to page 364:

A non-testifying serologist's notes and lab report are "testimonial statements" under *Crawford v Washington*, 541 US 36 (2004). *People v Lonsby*, ___ Mich App ___, ___ (2005). In *Lonsby*, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. In *Crawford,* "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at ___, quoting *Crawford, supra* at 51–52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford*'s definition of a "testimonial statement." The *Lonsby* Court stated:

> "Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the testimony of Woodford falls squarely within *Crawford*'s prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at ___.

September 2005

Update: Sexual Assault Benchbook

CHAPTER 4

Defenses To Sexual Assault Crimes

4.7 Consent

A. Applicability to Criminal Sexual Conduct Offenses

Add the following text to the end of the first paragraph on page 217:

Consent is not a defense to first-degree criminal sexual conduct under MCL 750.520b(1)(c) (penetration under circumstances involving the commission of any other felony) if consent is not a valid defense to the underlying felony. *People v Wilkens*, ___ Mich App ___, ___ (2005). Consent is not a defense to the felony of producing child sexually abusive material, MCL 750.145c(2), and therefore not a defense to MCL 750.520b(1)(c). *Wilkens, supra* at ___.

August 2005

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.4 "Assault" Offenses

A. Assault With Intent to Commit Criminal Sexual Conduct Involving Penetration

6. Pertinent Case Law—Affirmative Defenses

On page 46 replace the current paragraph in this sub-subsection with the following text:

Consent is not an affirmative defense to assault with intent to commit CSC if the victim is under sixteen years old because the victim is too young to consent. *People v Starks*, ___ Mich ___, ___ (2005). For more information on the consent defense, see Section 4.7.

CHAPTER 2

The Criminal Sexual Conduct Act

2.4 "Assault" Offenses

B. Assault With Intent to Commit CSC II—Contact

6. Pertinent Case Law—Affirmative Defenses

On page 48 replace the current paragraph in this sub-subsection with the following text:

Consent is not an affirmative defense to assault with intent to commit CSC if the victim is under sixteen years old because the victim is too young to consent. *People v Starks*, ___ Mich ___, ___ (2005). For more information on the consent defense, see Section 4.7.

CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

B. "Age"

Replace the last three sentences in the first paragraph on page 49 with the following text:

Similarly, the consent of victims under age 16 is legally ineffective for the CSC "assault" offenses. *People v Starks*, ___ Mich ___, ___ (2005).* For more information on the mistake-of-fact defense, see Section 4.11. For more information on the consent defense, see Section 4.7.

*Overuling in part, *Worrell, supra* at 622.

CHAPTER 4

Defenses to Sexual Assault Crimes

4.7 Consent

A. Applicability to Criminal Sexual Conduct Offenses

On page 217 beginning with the second paragraph, delete the text through the end of subsection (A) and insert the following text:

Consent is no longer a defense to assault with intent to commit CSC involving sexual penetration when the victim is under 16 years of age. *People v Starks*, ___ Mich ___, ___ (2005). In *Sparks,* the Court overturned the holding in *People v Worrell*, 417 Mich 617, 621–623 (1983). In *Sparks*, the defendant was charged with assault with intent to commit CSC involving penetration, MCL 750.520g(1). At the preliminary hearing, the victim testified that when he was 13 years old, the defendant asked the victim if he would like her to perform fellatio on him. The victim did not respond, and the defendant told him to pull down his pants. The victim unbuckled his belt and undid his pants. The victim testified "that as the defendant was about to perform fellatio," someone interrupted them. The district court dismissed the charge, finding no probable cause to believe that a crime was committed where the victim was never in fear of any battery.

On appeal, the Michigan Supreme Court stated:

> "[O]ne is guilty of an assault when one attempts an intentional, unconsented, and harmful or offensive touching. Moreover, consent must be given by one who is legally capable of giving consent to the act. . . . MCL 750.520d(1)(a) states that a person is guilty of third-degree criminal sexual conduct if the person engages in sexual penetration with another person and that person is at least thirteen but younger than sixteen years old. Accordingly, a thirteen-year-old child cannot legally consent to sexual penetration with another person because sexual penetration of a thirteen-year-old child is automatically third-degree criminal sexual conduct.
>
> * * *
>
> "Therefore, *Worrell's* incorrect conclusion that consent is always a defense to the crime of assault with intent to commit criminal sexual conduct involving sexual penetration is overruled." [Citation and footnotes omitted.] *Starks, supra* at ___.

CHAPTER 4
Defenses to Sexual Assault Crimes

4.7 Consent

B. Consent Inapplicable to Certain CSC Offenses

1. Offenses Requiring Proof of Age

Replace the second sentence on page 218 with the following text:

Because a person under 16 years of age is incapable of legally consenting to a sexual act, consent is inapplicable for all CSC elements requiring proof of a victim's age. *People v Starks*, ___ Mich ___, ___ (2005), and *People v Cash*, 419 Mich 230, 247–248 (1984). The holding in *People v Worrell,* 417 Mich 617 (1983), that consent is a defense to assault with intent to commit CSC involving sexual penetration, even if the victim is under 16 years of age, was overruled by the Court in *Starks, supra*.

July 2005

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.7 Child Sexually Abusive Activity

E. Pertinent Case Law

4. Definition of Terms

Insert the following text before the January 2004 update to page 137:

In *People v Tombs*, 472 Mich 446, 448 (2005), the Supreme Court upheld the Court of Appeals' finding in *People v Tombs*, 260 Mich App 201 (2003), that MCL 750.145c requires an intent to disseminate child sexually abusive materials to others. In upholding the Court of Appeals decision, the Court reviewed United States Supreme Court precedent addressing the issue of whether a criminal intent element should be read into a statute where it does not appear. See *Morissette v United States*, 342 US 246 (1952), *Staples v United States,* 511 US 600 (1994), and *United States v X-Citement Video, Inc,* 513 US 64 (1994). In applying the foregoing precedent to this case the Court held:

> "No *mens rea* with respect to distribution or promotion is explicitly required in MCL 750.145c(3). Absent some clear indication that the Legislature intended to dispense with the requirement, we presume that silence suggests the Legislature's intent not to eliminate *mens rea* in MCL 750.145c(3)." *Tombs, supra,* 472 Mich at 456-57.

The Court clarified the elements of distribution or promotion of child sexually abusive material under MCL 750.145c(3) as follows:

> "(1) the defendant distributed or promoted child sexually abusive material, (2) the defendant knew the material to be child sexually abusive material at the time of distribution or promotion, and (3)

the defendant distributed or promoted the material with criminal intent." *Tombs, supra,* 472 Mich at 465.

The Court also held "that the mere obtaining and possessing of child sexually abusive material using the Internet does not constitute a violation of MCL 750.145c(3)." *Tombs, supra,* 472 Mich at 465.

CHAPTER 3
Other Related Offenses

3.16 Indecent Exposure

D. Pertinent Case Law

Insert the following new sub-subsection on page 162 after the June 2005 update to section 3.16(D):

7. Public Exposure Not Necessary

In *People v Neal,* ___ Mich App ___, ___ (2005), the defendant exposed his erect penis to a minor female guest inside a bedroom in his home. After the jury returned a verdict of guilty, the defendant moved for a directed verdict, arguing that in order to be convicted of indecent exposure pursuant to MCL 750.335a, the exposure must take place in a public place. The trial court granted the defendant's motion for directed verdict and dismissed the charge. On appeal, the Court of Appeals overturned the trial court's finding and reinstated the defendant's conviction. MCL 750.335a prohibits "open" *or* "indecent" exposures that are knowingly made. MCL 750.335a does not require that "indecent" exposures only occur in a public place. Further, the Court found that case law does not require public exposure. The Court concluded that a trial court should not focus on the location of an indecent exposure but upon "the act of intentionally exposing oneself to others who would be expected to be shocked by the display." The Court concluded:

> "Here, defendant's exposure clearly falls within the definition of an 'open' exposure, whereas the victim would have reasonably been expected to observe it and, she might reasonably have been expected to have been offended by what was seen. . . . Additionally, defendant's conduct also falls under the definition of 'indecent' exposure. Defendant . . . made a knowing and intentional exposure of part of his body (his genitals) to a minor child in a place (a house) where such exposure is likely to be an offense against generally accepted standards of decency in a community. . . . It was not necessary that the exposure occur in a public place because there was in fact a witness to the exposure itself.[4] Thus, defendant's exposure could be properly categorized not only as an 'open' exposure, but also as an 'indecent' exposure for purposes of MCL 750.335a.

"[4] In light of our conclusion, the Standing Committee on Standard Criminal Jury Instructions may want to review CJI2d 20.33(4)." *Neal, supra* at ___.

CHAPTER 4

Defenses to Sexual Assault Crimes

4.10 Insanity, Guilty But Mentally Ill, Involuntary Intoxication, and Diminished Capacity

D. Diminished Capacity

Insert the following text on page 234 after the quote near the middle of the page:

In *People v Tierney*, ___ Mich App ___, ___ (2005), the defendant argued that the trial court erred in prohibiting him from introducing expert testimony regarding his mental state to negate his intent. The trial court excluded the expert testimony based on the holding in *People v Carpenter*, 464 Mich 223 (2001), which removed diminished capacity as a viable defense. On appeal, the defendant argued that the Court's ruling in *Carpenter* was dicta and was therefore not binding. The Court of Appeals rejected that argument and in upholding the trial court's ruling stated:

> "In our view, the *Carpenter* ruling was not dicta. Not only was it essential to the determination of the case, it was the very basis of the Court's resolution of the case. So long as case law established by our Supreme Court remains valid, this Court and all lower courts are bound by that authority." [Citation omitted.] *Tierney*, *supra* at ___.

The Court of Appeals also rejected defendant's argument that the trial court's ruling prevented him from presenting a defense. Defendant was allowed to present non-expert testimony regarding intent.

CHAPTER 7
General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the April 2004 update to page 364:

In *United States v Arnold*, ___ F3d ___ (CA 6, 2005), the Sixth Circuit expounded on the Supreme Court's discussion of testimonial evidence in *Crawford v Washington*, 541 US 36, 51-53, 68 (2004), by examining the dictionary definitions of the terms "testimony" and "testimonial." In *Arnold*, the court noted that "[t]he Oxford English Dictionary ('OED') defines 'testimonial' as 'serving as evidence; conducive to proof;' as 'verbal or documentary evidence;' and as '[s]omething serving as proof or evidence.' . . . The OED defines 'testimony' as '[p]ersonal or documentary evidence or attestation in support of a fact or statement; hence, *any form of evidence or proof*.' . . . (emphasis added)." The Court further noted that Webster's Third New International Dictionary of the English Language "defines 'testimonial' as 'something that serves as evidence: proof.'" In *Crawford*, the Court stated that an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." In *Arnold,* the victim "made the statements to government officials: the police. This fact alone indicates that the statements were testimonial . . . ." *Arnold, supra* at ___. In addition, the *Arnold* Court found that because the victim was the only witness to the incident, she could reasonably expect that her statements would be used to prosecute the defendant and to "establish or prove a fact." The Court concluded that this finding was supported by the holding in *United States v Cromer,* 389 F3d 662 (CA 6, 2004) that a "statement made knowingly to the authorities that describes criminal activity is almost always testimonial."

June 2005

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.3 "Contact" Offenses

B. Criminal Sexual Conduct—Fourth Degree

Insert the following new sub-subsection before Section 2.4 on page 43:

6. Pertinent Case Law

In *People v Russell*, ___ Mich App ___, ___ (2005), the Court of Appeals upheld the constitutionality of the CSC IV statute. In *Russell*, the defendant argued that MCL 750.520e(1)(d) is "unconstitutionally vague because it 'appears to absolutely preclude any sexual contact between . . . two consenting adults related by marriage only.'" The Court of Appeals rejected the defendant's argument, finding that the term "affinity" is not unconstitutionally vague, and that the statute does not give "the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed" because "sexual contact" is clearly defined.

CHAPTER 3

Other Related Offenses

3.16 Indecent Exposure

D. Pertinent Case Law

Insert the following new sub-subsection after the June 2003 update to page 162:

6. Indecent Act Televised

In *People v Huffman*, ___ Mich App___, ___ (2005), the defendant produced a television show with a three-minute segment showing a penis and testicles marked with facial features. A voice-over provided "purportedly humorous commentary as if on behalf of the character." *Id.* The defendant was charged with and convicted of indecent exposure. On appeal, the defendant argued that MCL 750.335a cannot be properly construed to apply to televised images. The Court of Appeals upheld the conviction, concluding that the purposes of the indecent exposure statute are "fulfilled by focusing on the impact that offensive conduct might have on persons subject to an exposure." *Huffman, supra.* The Court found that a televised exposure could be more shocking than a physical exposure because the persons subjected to it are in private homes. Furthermore, the defendant's exposure on television was more likely a close up and lasted longer than a physical exposure. *Id.*

The court also concluded that defendant's right to free speech was not violated by his conviction of indecent exposure. *Id.*, relying on *United States v O'Brien*, 391 US 367 (1968), *Barnes v Glen Theatre, Inc*, 501 US 560 (1991), and *City of Erie v Pap's AM,* 529 US 277 (2000).

CHAPTER 7
General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the May 2005 update to page 364:

A witness' statement identifying the defendants for police is a testimonial statement under *Crawford v Washington*, 541 US 36 (2004). In *United States v Pugh*, ___ F3d ___, ___ (CA 6, 2005), the defendants were convicted of several counts relating to a bank robbery. During the trial, a police officer testified that a witness identified pictures of the defendants during the witness' interview with police. The witness never testified at trial, and it is unclear whether she was unavailable or simply absent. The United States Court of Appeals for the Sixth Circuit concluded that the statement was given during a formal police interrogation, and a reasonable person would anticipate that the statement would be used against the accused for investigation and prosecution. Therefore, the statement was testimonial in nature. Further, the statement was offered for the truth of the matter asserted – that the defendants were in fact the men in the picture.

CHAPTER 7
General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the October 2004 update to page 364:

*See the October 2004 update to page 364 for a detailed discussion of this case.

The prosecutor appealed the Court of Appeals decision in *People v Shepherd*, 263 Mich App 665 (2004),* and the Michigan Supreme Court reversed the Court of Appeals and reinstated the defendant's perjury conviction. *People v Shepherd*, ___ Mich ___, ___ (2005). The Court found the alleged constitutional error was harmless beyond a reasonable doubt because there was "overwhelming evidence of the falsity of defendant's testimony in the fleeing and eluding trial, . . . [and] it is clear beyond a reasonable doubt that a reasonable jury would have found defendant guilty of perjury even if the transcript of Butters's plea to the charge of subornation of perjury had not been admitted." Because the Court determined that the error was harmless, the Court found that it was "not necessary to address whether the admission of the transcript violated the Confrontation Clause of the United States Constitution, US Const, Am VI . . . ." *Shepherd, supra* at ___ n 4.

CHAPTER 10

Other Remedies for Victims of Sexual Assault

10.3 Defenses to Civil Actions

A. Statutes of Limitations for Civil Actions

2. Commencement of Limitations Period and the "Discovery Rule"

Insert the following text immediately before sub-subsection (3) on page 486:

The discovery rule is applied "to avoid unjust results which could occur when a reasonable and diligent plaintiff would be denied the opportunity to bring a claim due [] to . . . the inability of the plaintiff to learn of or identify the causal connection between the injury and the breach of a duty owed by a defendant." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, ___ Mich App ___ (2005).

In *Trentadue*, the plaintiff brought claims against the defendants that, without application of the discovery rule, would have been precluded by the relevant statutes of limitation. The defendants argued that the discovery rule could not be used to extend a claim's date of accrual until the perpetrator's identity is established or a plaintiff has determined all the causes of action possible. The Court of Appeals agreed with the plaintiff that the discovery rule applied to mark the date of accrual as the date on which the reasonable and diligent plaintiff discovered the causal relationship between the plaintiff's injury (the victim's death) and the defendants' breach of a duty owed to the victim. *Id.* at ___.

The Court distinguished the case from cases of unknown identity to which the discovery rule does not apply. In *Trentadue*, the plaintiff was aware of the injury and the cause (the plaintiff's decedent was murdered); what the plaintiff did not know, and could not have known until the killer's culpability was established, was that other parties, based on their relationship to the killer, harmed the victim by breaching duties owed to the victim. *Id.* at ___.

May 2005

Update: Sexual Assault Benchbook

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the April 2004 update to page 364:

Admission of an unavailable witness's statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. In *United States v Garcia-Meza,* ___ F3d ___, ___ (CA 6, 2005), the defendant admitted killing his wife but argued that he did not possess the requisite intent to be convicted of first-degree murder. The trial court admitted as excited utterances the victim's statements made to police after a prior assault. The defendant argued that the victim's statements were inadmissible under *Crawford v Washington*, 541 US 36 (2004). The Sixth Circuit rejected this argument and stated:

> "[T]he Defendant has forfeited his right to confront [the victim] because his wrongdoing is responsible for her unavailability. *See Crawford*, 541 U.S. 36, 124 S. Ct. at 1370 ('[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds'); *Reynolds v. United States,* 98 U.S. 145, 158–59 (1879) ('The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. . . . The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong.')."

The *Garcia-Meza* Court also rejected the defendant's assertion that forfeiture only applies when a criminal defendant kills or otherwise prevents a witness from testifying with a specific intent to prevent him or her from testifying. Although FRE 804(b)(6) (and MRE 804(b)(6)) may contain this requirement, it is not a requirement of the Confrontation Clause. *Garcia-Meza, supra* at ___.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.6 Post-Conviction Request for DNA Testing

On page 471, replace the last sentence of the first paragraph in this section with the following text:

Effective April 1, 2005, all petitions must be filed no later than January 1, 2009. 2005 PA 4.

April 2005

Update: Sexual Assault Benchbook

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text on page 364 after the April 2004 update:

In *People v Walker,* ___ Mich App ___, ___ (2005), the Court of Appeals held that a crime victim's statements to a neighbor and a police officer do not constitute "testimonial statements" for purposes of the Confrontation Clause. In *Walker*, the defendant beat the victim and threatened to kill her. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule. The defendant argued that pursuant to *Crawford v Washington,* 541 US 36 (2005), admission of the victim's statements violated the Confrontation Clause because they were "testimonial statements." The Court rejected the defendant's argument and stated:

> "We discern no holding or analysis in *Crawford* that would lead us to conclude that the victim's statements to her neighbor, and the repetition of her statements to responding police officers, were testimonial hearsay violative of the Confrontation Clause."

February 2005

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.30 Stalking and Aggravated Stalking

D. Defenses to Stalking

1. Legitimate Purpose

On page 196 after the case summary of *People v Coones,* insert the following case summary:

- *Nastal v Henderson & Associates Investigations, Inc*, ___ Mich ___, ___ (2005):

The Michigan Supreme Court held that surveillance by a licensed private investigator is conduct that serves a legitimate purpose as long as the surveillance serves or contributes to the purpose of obtaining information, as permitted by the Private Detective License Act, MCL 338.821 *et seq*. MCL 338.822(b) provides that licensed private investigators may obtain information with reference to any of the following:

> "(*i*) Crimes or wrongs done or threatened against the United States or a state or territory of the United States.
>
> "(*ii*) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person.
>
> "(*iii*) The location, disposition, or recovery of lost or stolen property.
>
> "(*iv*) The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or property.

> "(*v*) Securing evidence to be used before a court, board, officer, or investigating committee."

In *Nastal*, the plaintiff sued the owner-operator of a tractor-trailer for negligence. The owner-operator's insurance company hired defendant, a licensed private investigation firm, to perform surveillance of plaintiff. Defendant surveilled plaintiff on four separate occasions. On each occasion, the surveillance was terminated because the investigators determined that the plaintiff knew he was being observed and any further surveillance at that time would serve no further purpose. The plaintiff filed a civil stalking claim pursuant to MCL 600.2954. The defendants argued that the investigators were engaged in conduct that served a legitimate purpose under MCL 750.411h(1)(c) and therefore could not be guilty of stalking. The Michigan Supreme Court agreed with the defendants and held that when a licensed private investigator is conducting surveillance to obtain evidence concerning a party's claim in a lawsuit, the activity falls within the legitimate purpose defense to stalking. *Nastal, supra* at ___.

January 2005

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.7 Child Sexually Abusive Activity

A. Statutory Authority

3. Possession of Child Sexually Abusive Material

Effective December 28, 2004, 2004 PA 478 amended MCL 750.145c. The amendments added computer technicians to the list of people that are exempt from MCL 750.145c(4). In the March 2003 update to page 132, replace the quoted paragraph (a) with the following quote:

> "(a) A person described in [MCL 752.367 (governing exemptions from first- and second-degree obscenity)], a commercial film or photographic print processor acting pursuant to subsection (8), or a computer technician acting pursuant to subsection (9).*" MCL 750.145c(4)(a).

*(MCL 750.145c(8) and MCL 750.145c(9) create immunity from civil liability and protect as confidential the identity of a commercial film or photographic print processor or a computer technician who reports a depiction of a child engaged in a listed sexual act to a law enforcement agency.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.5 Imposition of Sentence

E. Probation

5. Contents of Probation Orders

Effective January 1, 2005, 2004 PA 219 amended MCL 771.3 to allow the court to impose an additional condition on probationers. After the fourth bullet on page 461, insert the following bullet:

- Participate in a drug treatment court. Note, however, that persons charged with or who have pled guilty to "criminal sexual conduct of any degree" are ineligible for drug treatment court. MCL 600.1060(g)(*i*) and MCL 600.1064(1).

6. Delayed Sentencing

Effective January 1, 2005, 2004 PA 219 amended MCL 771.1(2) to allow for an offender's participation in drug treatment court. In the paragraph beginning at the bottom of page 461, change the quotation of MCL 771.1(2) to read "eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court under . . . MCL 600.1060 to 600.1082." Note, however, that persons charged with or who have pled guilty to "criminal sexual conduct of any degree" are ineligible for drug treatment court. MCL 600.1060(g)(*i*) and MCL 600.1064(1).

CHAPTER 10

Other Remedies for Victims of Sexual Assault

10.3 Defenses to Civil Actions

A. Statutes of Limitations for Civil Actions

2. Commencement of Limitations Period and the "Discovery Rule"

Insert the following text before the November 2002 update to page 486:

A plaintiff's claim of fraudulent concealment under MCL 600.5855 requires the plaintiff to establish that the conduct on which the fraudulent concealment claim is based prevented the plaintiff from knowledge of his or her claim against the defendant. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, ___ Mich App ___, ___ (2004). In *Doe*, the plaintiff claimed that the statute of limitations on his tort action should be tolled by the defendant's concealment of plaintiff's claims against the defendant.

The plaintiff claimed that the defendant knew about and purposely concealed Burkholder's (a priest's) history of sexual abuse by moving the priest from diocese to diocese and that this conduct prevented the plaintiff from knowing that other complaints had been lodged against Burkholder and that the plaintiff himself had legal recourse against the defendant. *Doe, supra* at ___. The Court of Appeals disagreed:

> "[E]ven if plaintiff did not know for certain that defendant knew of Burkholder's abuse of other children, defendant's knowledge of Burkholder's abuse of other children was not required for plaintiff to be aware of his causes of action against defendant.
>
> * * *
>
> "It was not necessary for plaintiff to know of widespread abuse in the church for him to have had knowledge of his causes of action against defendant. Thus, even if defendant attempted to conceal the "widespread sexual abuse" problem from the public at large, this attempt could not have concealed from plaintiff his causes of action against defendant." *Doe, supra* at ___.

The Court explained that the actions on which the plaintiff based his fraudulent concealment claim "amount[ed] to mere silence," conduct that is insufficient to support an exception to the applicable statute of limitations on tort claims. Accordingly, the Court ruled that the plaintiff's claims were time-barred because the fraudulent concealment exception under MCL 600.5855 did not apply.

CHAPTER 11

Sex Offender Identification and Profiling Systems

11.6 Law Enforcement's Retention of Fingerprints, Arrest Card, and Description

B. Mandatory Reporting By Clerk of Court on Final Dispositions

Effective January 1, 2005, 2004 PA 220 amended MCL 769.16a to expand the list of dispositions that the clerk must report to the State Police. On page 547 at the end of the first full paragraph add the following text:

The report must also include the sentence if imposed under MCL 750.350a (parental kidnapping) and MCL 600.1076(4) (discharge and dismissal of drug treatment court proceedings). MCL 769.16a(1)(b)–(c).